

LIBRARY

Office Supreme Court, U.S.
FILED

JUN 5 1962

JOHN F. DAVIS, CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~105~~

10
1963

SIMON BOUIE and TALMADGE J. NEAL,

Petitioners,

—V.—

CITY OF COLUMBIA.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA**

JACK GREENBERG

CONSTANCE BAKER MOTLEY

JAMES M. NABRIT, III

MICHAEL MELTSNER

10 Columbus Circle

New York 19, New York

MATTHEW J. PERRY

LINCOLN C. JENKINS, JR.

1107½ Washington Street

Columbia, South Carolina

Attorneys for Petitioners

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions Involved	3
Statement	3
How the Federal Questions Were Raised and Decided	6
Reasons for Granting the Writ	10
I. The Decision Below Conflicts With Prior Decisions of This Court Which Condemn the Use of State Power to Enforce Racial Segregation	10
II. The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States	16
Conclusion	27
APPENDIX	
Opinion of the Columbia Recorder's Court	1a
Opinion of the Richland County Court	3a
Opinion of the Supreme Court of South Carolina	10a
Denial of Rehearing by the Supreme Court of South Carolina	14a

Table of Cases

	PAGE
Abrams v. United States, 250 U. S. 616	17
Boynton v. Virginia, 364 U. S. 454	11
Breard v. Alexandria, 341 U. S. 622	14, 17
Buchanan v. Warley, 245 U. S. 60	12
Burton v. Wilmington Parking Authority, 365 U. S. 715	13
Cantwell v. Connecticut, 310 U. S. 296	26
Champlin Rev. Co. v. Corporation Com. of Oklahoma, 286 U. S. 210	26
Chaplinsky v. New Hampshire, 315 U. S. 568	25
City of Charleston v. Mitchell, — S. C. —, 123 S. E. 2d 512 (Petition for Writ of Certiorari No. 846 filed 30 U. S. L. Week 3324)	10, 11
City of Columbia v. Barr, — S. C. —, 123 S. E. 2d 521 (Petition for Writ of Certiorari No. 847 filed 30 U. S. L. Week 3324)	10, 11
City of Greenville v. Peterson, — S. C. —, 122 S. E. 2d 826 (Petition for Writ of Certiorari No. 750 filed 30 U. S. L. Week 3274)	9, 11, 21
Civil Rights Cases, 109 U. S. 3	11, 15
District of Columbia v. John R. Thompson Co., 346 U. S. 100	13
Freeman v. Retail Clerks Union, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959)	18
Garner v. Louisiana, 368 U. S. 157	13-14, 15, 16, 18, 26
Goldblatt v. Town of Hempstead, 30 U. S. L. Week 4343	12

Herndon v. Lowry, 301 U. S. 242	23, 24, 25
Hudson County Water Co. v. McCarter, 209 U. S. 349	16
Lanzetta v. New Jersey, 306 U. S. 451	22, 24
Mapp v. Ohio, 367 U. S. 643	14
Marsh v. Alabama, 326 U. S. 501	12, 18
Martin v. Struthers, 319 U. S. 141	17
McBoyle v. United States, 283 U. S. 25	23, 25
Monroe v. Pape, 365 U. S. 167	11
Munn v. Illinois, 94 U. S. 113	12
N. A. A. C. P. v. Alabama, 357 U. S. 449	17
Napue v. Illinois, 360 U. S. 264	11
N. L. R. B. v. American Pearl Button Co., 149 F. 2d 258 (8th Cir. 1945)	18
N. L. R. B. v. Fansteel Metal Corp., 306 U. S. 240	18
People v. Barisi, 193 Misc. 934, 83 N. Y. S. 2d 277 (1948)	18
People v. King, 110 N. Y. 419, 18 N. E. 245 (1888), Annotation 49 A. L. R. 505	13
Pickett v. Kuchan, 323 Ill. 138, 153 N. E. 667, 49 A. L. R. 449 (1926)	13
Pierce v. United States, 314 U. S. 206	22, 24
Poe v. Ullman, 367 U. S. 497	14
Railway Mail Assn. v. Corsi, 326 U. S. 88	13
Republic Aviation Corp. v. N. L. R. B., 324 U. S. 793	12, 18
Schenck v. United States, 249 U. S. 47	19
Screws v. United States, 325 U. S. 91	11
Shelly v. Kraemer, 334 U. S. 1	11, 12
Shramek v. Walker, 149 S. E. 331	8
State v. Gray, 76 S. C. 83	20

	PAGE
State v. Green, 35 S. C. 266	20
State v. Hallback, 40 S. C. 298	20
State of Maryland v. Williams, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357 (1959)	18
State v. Mays, 24 S. C. 190	20
State v. Tenney, 58 S. C. 215	20
Stromberg v. California, 283 U. S. 359	17
Thompson v. City of Louisville, 362 U. S. 199	21
Thornhill v. Alabama, 310 U. S. 88	14, 17, 18
United States v. Cardiff, 344 U. S. 174	23, 24
United States v. L. Cohen Grocery Co., 255 U. S. 81	23, 24
United States v. Weitzel, 246 U. S. 533	23
United States v. Willow River Power Co., 324 U. S. 499	12
United States v. Wiltberger, 18 U. S. (5 Wheat.) 76	23
Western Turf Asso. v. Greenberg, 204 U. S. 359	13
West Virginia State Board of Education v. Barnette, 319 U. S. 624	17
Winters v. New York, 333 U. S. 507	25, 26

Statutes

Code of Laws of South Carolina, 1952, Section 15-909	5, 7, 8
Code of Laws of South Carolina, 1952, Section 16-386	3, 5, 6, 7, 8, 9
Code of Laws of South Carolina, 1960, Section 16-386	21, 25
United States Code, Title 28, Section 1257(3)	2

Other Authorities

PAGE

Ballentine, "Law Dictionary" (2d Ed. 1948)	25
Black's "Law Dictionary" (4th Ed. 1951)	25
Henkin, " <i>Shelley v. Kraemer</i> : Notes for a Revised Opinion," 110 U. of Penn. L. Rev. 473	12, 13, 14
Konvitz, "A Century of Civil Rights"	13

IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No.

SIMON BOUIE and TALMADGE J. NEAL,

Petitioners,

—v.—

CITY OF COLUMBIA.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA.**

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on February 13, 1962, rehearing of which was denied on March 7, 1962.

Citation to Opinions Below

The opinion of the Supreme Court of South Carolina is unreported as of yet and is set forth in the appendix hereto, *infra*, pp. 10a-13a. The opinion of the Richland County Court is unreported and is set forth in the appendix hereto, *infra*, pp. 3a-9a. The opinion of the Recorder's Court of the City of Columbia is unreported and is set forth in the appendix hereto, *infra*, pp. 1a-2a.

Jurisdiction

The Judgment of the Supreme Court of South Carolina was entered February 13, 1962, *infra*, pp. 10a-13a. Petition for Rehearing was denied by the Supreme Court of South Carolina on March 7, 1962, *infra*, p. 14a.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257(3), petitioners having asserted below and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Whether the due process and equal protection clauses of the Fourteenth Amendment permit a state to use its executive and judiciary to enforce racial discrimination in conformity with a state custom of discrimination by arresting and convicting petitioners of criminal trespass on the premises of a business which has for profit opened its property to the general public.

2. Whether petitioners' conviction of trespass at the restaurant of a variety store offends the due process clause of the Fourteenth Amendment when petitioners were convicted for engaging in a sit-in protest demonstration and the criminal statute applied to convict petitioners gave no fair and effective warning that their actions were prohibited, and their conduct violated no standard required by the plain language of the law or any earlier interpretation thereof.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.
2. This case also involves Section 16-386, Code of Laws of South Carolina for 1952, as amended, which states:

Entry on lands of another after notice prohibiting same

Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing.

Statement

At approximately 11:00 A.M. on March 14, 1960, petitioners, two Negro college students entered the Eckerd's Variety Store in Columbia, South Carolina (R. 36, 49). They seated themselves at a booth in the food department and sought service (R. 7, 31, 33, 35, 49, 52). Both testified they had money with which to purchase food (R. 3, 16, 38, 48, 51, 55). No one spoke to the petitioners or approached them to take their order for food (R. 31, 32, 38). After petitioners were seated an employee of the store

put up a chain with a "No Trespassing" sign (R. 35). Petitioners testified that white persons were seated in the food department and were being served food at this time (R. 36, 37, 53, 54). They continued to sit in the booth for some fifteen or twenty minutes (R. 30, 49). While waiting service, petitioners sat each with an open book before him (R. 3, 16, 38, 51).

The manager of Eckerd's called the Columbia police (R. 32) who arrived and proceeded with the manager directly to the booth where petitioners were seated (R. 3, 6). The manager told petitioners to leave " . . . because we aren't going to serve you" (R. 3, 12). Petitioners remained seated and the Chief of Police then asked petitioners to leave (R. 3, 50). When petitioners did not comply the Chief of Police placed them under arrest (R. 3, 13). Bouie asked the Chief of Police "for what" (R. 4, 5, 12). The Chief then "reached and got him by the arm . . . and . . . had to pull him out of the seat" (R. 4). The Chief then seized him by the belt, gave him a "preliminary frisk," and marched him out of the store (R. 4, 17, 51). Bouie testified that he offered no resistance and told the Chief "That's all right, Sheriff, I'll come on" (R. 51).

The Chief was asked on cross examination: Q. "Chief, isn't it a fact that the only reason you were called in from the Police Department to arrest these two persons, was because they were Negroes who were asking for service (sic) in the food department in Eckerd's drug store, and the manager was directing them out because they were Negroes? Isn't that correct?" A. "Why certainly, I would think that would be the case" (R. 20, 21).

Eckerd's, one of Columbia's larger variety stores is part of a regional chain with numerous stores located throughout the South (R. 19, 29). In addition to the food depart-

ment, Eckerd's maintains other departments including retail drug, cosmetic and prescriptions (R. 20, 29). Negroes and whites are invited to purchase and are served alike in all departments of the store with the single exception that Negroes "have never been" served in the food department which is reserved for whites (R. 29, 30, 52). Negroes are not served in the food department because as the store manager put it, "... all the stores do the same thing" (R. 31). There was, however, no evidence that any signs or notices are present in the store indicating that Negroes are not served at the lunch counter.

Throughout the events that led to their arrest, petitioners were completely orderly and peaceful (R. 9, 35).

Petitioners were charged with trespass in violation of Section 16-386 as amended of the Code of Laws of South Carolina, *infra*, p. 10a. Section 16-386 states:

Entry on lands of another after
notice prohibiting same.

"Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another; after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and be punished by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purposes of trespassing."

Petitioners were also charged with breach of the peace in violation of Section 15-909, Code of Laws of South Caro-

lina, 1952, *infra*, p. 10a. Petitioner Bouie was also charged with the common law crime of resisting arrest, *infra*, p. 10a.

Petitioners were tried in the Recorder's Court of the City of Columbia without a jury and convicted of trespass in violation of Section 16-386 and sentenced to pay fines of \$100.00 or serve thirty days in jail, \$24.50 of the fines being suspended. Petitioner Bouie was convicted of resisting arrest and fined \$100.00 or thirty days, \$24.50 of the fine being suspended. Bouie's sentences were to run consecutively (R. 62, 63).

Petitioners appealed to the Richland County Court which sustained the judgments and sentences of the Recorder's Court of the City of Columbia on April 28, 1961, *infra*, pp. 3a-9a.

Petitioners thereupon appealed to the Supreme Court of South Carolina which affirmed the judgment of conviction of trespass in violation of Title 16, Section 386 of the 1952 Code of Laws of South Carolina, as amended, and reversed the judgment of conviction against petitioner Bouie for resisting arrest on February 13, 1962, *infra*, pp. 10a-13a. The Supreme Court of South Carolina denied rehearing on March 7, 1962, *infra*, p. 14a.

How the Federal Questions Were Raised and Decided Below

At the close of the Prosecution's case in the Recorder's Court of the City of Columbia, petitioners moved to dismiss the charges against them on the grounds, *inter alia*, that (R. 25, 26, 65-66):

“... for the State to stand idly by and allow a private individual in public business to discriminate against the defendants on the basis of race and color alone

and then for the State to back up this discrimination by State action in ejecting, arresting and subjecting to trial these defendants is a denial of due process of law and a denial of the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution.

The defendants move to dismiss the charges of trespass and breach of the peace, in violation of State Statutes Section 16-386 and 15-909, on the ground that evidence proves that the defendants were merely attempting to exercise their rights as business invitees of a business catering to the general public to exercise the freedom of being served by said business on a non-discriminating basis without regard to race and color and in so doing were not guilty of any crime.

Further, the defendants move to dismiss all charges against them on the ground that to deprive them of their liberty to enter such a business establishment as the record describes and be served as others, and that to be ejected and arrested by agents of the State—the police—solely on the basis of race and color, and to be singled out as the only persons ejected while others remain, is a denial of due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution."

The motion was overruled by the trial Court (R. 26).

Petitioners moved to dismiss the charges against them on the same grounds at the close of trial (R. 60, 63-66). This motion was denied by the trial Court (R. 60, 61-63).

Subsequent to judgment of conviction in the trial Court petitioners moved for arrest of judgment or in the alternative a new trial on the ground that:

"... State Code No. 16-386, as amended, trespass and State Code No. 15-909, breach of peace, though constitutional on their faces, are as to these defendants, unconstitutionally applied, thus denying to these defendants due process of law and equal protection of the laws, in violation of the 14th Amendment of the United States Constitution..." (R. 68).

The motion for arrest of judgment or in the alternative for a new trial was supported by the same grounds as petitioners' motions to dismiss (R. 68-69). This motion was denied by the trial Court (R. 61).

Petitioners appealed to the Richland County Court renewing the constitutional objections to their convictions relied upon in the trial Court. The Richland County Court held that the proprietor of a restaurant can choose his customers on the basis of color without violating constitutional provisions and that in aiding his policy of exclusion the State of South Carolina was not enforcing racial discrimination (R. 71, 74). The Court also held:

The Defendants, under South Carolina law, had no right to remain in the stores after the manager asked them to leave. *Shramek v. Walker*, 149 S. E. 331, 152 S. C. 88. As the Court quoted the rule, "while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser, and justify the owner in using reasonable force to eject him" (R. 72-73).

Petitioners appealed to the Supreme Court of South Carolina claiming error in that the Court below refused (R. 76, 77):

"... to hold that the evidence shows conclusively that the arresting officers acted in the furtherance of a custom, practice and policy of discrimination based solely on race or color, and that the arrests and convictions of appellants under such circumstances are a denial of due process of law and the equal protection of the laws, secured to them by the Fourteenth Amendment to the United States Constitution.

4. The Court erred in refusing to hold that the evidence establishes merely that at the time of their arrests appellants were peaceably upon the premises of Eckerd's drug store as customers, visitors, business guests or invitees of a business establishment performing economic functions invested with the public interest, and that the procurement of the arrest of appellants by management of said establishment under such circumstances in furtherance of a custom, practice and policy of racial discrimination is a violation of rights secured appellants by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution."

The Supreme Court of South Carolina affirmed petitioners' conviction of trespass in violation of Title 16-Section 386, as amended, of the 1952 Code of Laws of South Carolina, holding that appellants' contention that "arrest by the police officer at the instance of the store manager, and the convictions of trespass that followed, were in furtherance of an unlawful policy of racial discrimination and constituted state action in violation of appellants' right under the Fourteenth Amendment" had been made, considered and rejected previously by the Court. The cases relied upon by the Supreme Court of South Carolina were *City of Greenville v. Peterson*, — S. C. —, 122 S. E. (2d) 826 (Petition for Writ of Certiorari

No. 750 filed 30 U. S. L. Week 3274); *City of Charleston v. Mitchell*, — S. C. —, 123 S. E. (2d) 512 (Petition for Writ of Certiorari No. 846 filed 30 U. S. L. Week 3324); *City of Columbia v. Barr*, — S. C. —, 123 S. E. (2d) 521 (Petition for Writ of Certiorari No. 847 filed 30 U. S. L. Week 3324).

The Supreme Court of South Carolina reversed petitioner Bouie's conviction for resisting arrest on the ground that the "momentary delay" of petitioner in responding to the officer's command did not amount to "resistance."

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Prior Decisions of This Court Which Condemn the Use of State Power to Enforce Racial Segregation.

Petitioners were not served in Eckerd's because they were Negroes and the custom of the City of Columbia is that Negroes may not be served at restaurants which also cater to whites (R. 31). See Petition for Writ of Certiorari in *City of Columbia v. Barr, et al.*, No. 847 filed in this Court 30 U. S. L. Week 3324. As the store manager put it "all stores do the same thing" (R. 31). It is also apparent that the arrests were made to support this discrimination. On cross examination the arresting officer was asked:

Q. "Chief, isn't it a fact that the only reason you were called in from the Police Department to arrest these two persons was because they were Negroes who were asking for service (sic) in the food department in Eckerd's drug store, and the manager was directing them out because they were Negroes? Isn't that cor-

rect?" A. "Why certainly, I would think that would be the case" (R. 20, 21).

The trial court convicted petitioners on evidence plainly indicating that race and race alone was the reason they were ordered to leave the restaurant.

The Supreme Court of South Carolina recognized the issue in this case to be whether police and judicial enforcement of Eckerd's racial discrimination policy violated the equal protection clause of the Fourteenth Amendment.

"... the contention [is] that appellants' arrest by the police officer at the instance of the store manager, and the convictions of trespass that followed, were in furtherance of an unlawful policy of racial discrimination and constituted state action in violation of appellants' rights under the Fourteenth Amendment" (*infra*, p. 12a).

It answered this question contrary to petitioners' position by relying upon cases, involving similar issues, which are now pending before this Court, e.g. *Columbia v. Barr*, — S. C. —, 123 S. E. 2d 521, No. 847 October Term, 1961; *City of Greenville v. Peterson*, — S. C. —, 122 S. E. 2d 826 (No. 750, October Term, 1961); *Charleston v. Mitchell*, — S. C. —, 123 S. E. 2d 512 (No. 846 October Term, 1961).

But the decision is contrary to a growing body of principles declared by this Court. Where there is state action by the police, *Screws v. United States*, 325 U. S. 91; *Monroe v. Pape*, 365 U. S. 167; prosecutors, *Napue v. Illinois*, 360 U. S. 264, and judiciary, *Shelley v. Kraemer*, 334 U. S. 1, 14-18; *Boydton v. Virginia*, 364 U. S. 454, racial discrimination supported by state authority violates the Fourteenth Amendment. *Civil Rights Cases*, 109 U. S. 3, 17.

It is asserted, however, that the state is not enforcing racial discrimination, but is implementing a property right. But to the extent that management was asserting a "property" right to enforce racial segregation according to the custom of the City of Columbia, it becomes pertinent to inquire just what that property right is. See Henkin, "*Shelley v. Kraemer*: Notes for a Revised Opinion," 110 U. of Penn. L. Rev. 473, 494-505.

The mere fact that "property" is involved does not settle the matter, *Shelley v. Kraemer*, 334 U. S. 1, 22. "Dominion over property springing from ownership is not absolute and unqualified." *Buchanan v. Warley*, 245 U. S. 60, 74; *United States v. Willow River Power Co.*, 324 U. S. 499, 510; *Marsh v. Alabama*, 326 U. S. 501, 506; cf. *Munn v. Illinois*, 94 U. S. 113; *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 796, 802; *Goldblatt v. Town of Hempstead*, 30 U. S. L. Week 4343.

Eckerd's is a commercial variety store open to the public generally for the transaction of business, including the sale of food and beverages in its restaurant. It does not seek to keep everyone, or Negroes, or these petitioners from coming upon the premises. The white public is invited to use all the facilities of the store and Negroes are invited to use all these facilities except the restaurant. The management does not seek to exclude petitioners because of an arbitrary caprice, but rather, follows the community custom of Columbia which is, in turn, supported and nourished by law.

The portion of the store from which petitioners are excluded is not set aside for private or non-public use as an office reserved for the management or lounge or private restroom for employees. Petitioners did not seek to use the restaurant for any function inappropriate to its normal use. They merely sought food service. Therefore, it appears that the property interest which the State protects

here, by arrest, prosecution, and criminal conviction, is the claimed right to open the premises to the public generally, including Negroes, for business purposes, including the sale of food and beverages, while racially discriminating against Negroes, as such, at one integral part of the facilities. While this may, indeed, be a property interest, the question before this Court is whether the State may enforce it without violating the Fourteenth Amendment. This property interest certainly may be taken away by the State without violating the Fourteenth Amendment. *Western Turf Assn. v. Greenberg*, 204 U. S. 359; *Railway Mail Assn. v. Corsi*, 326 U. S. 88; *Pickett v. Kuchan*, 323 Ill. 138, 153 N. E. 667, 49 A. L. R. 499 (1926); *People v. King*, 110 N. Y. 419, 18 N. E. 245 (1888); Annotation 49 A. L. R. 505; cf. *District of Columbia v. John R. Thompson Co.*, 346 U. S. 100; Henkin, *supra* at p. 499 n. 52.

Many states make it a crime to engage in the racially discriminatory use of private property which South Carolina enforces here. For the latest collection of such statutes, see Konvitz, *A Century of Civil Rights*. (1961), *passim*. Indeed, Eckerd's has sought to achieve in this case something which the State itself could not permit it to do on state property leased to it for business use. *Burton v. Wilmington Parking Authority*, 365 U. S. 715, or require or authorize it to do by positive legislation. See Mr. Justice Stewart's concurring opinion in *Burton, supra*. Although it does not necessarily follow from the fact that some states constitutionally may make racial discrimination on private property criminal, that other states may not enforce racial discrimination, it does become evident that Eckerd's property interest is hardly inalienable or absolute.

Basic to the disposition of this case is that Eckerd's is a public establishment open to serve the public as a part of the public life in the community. See *Garner v. Louisiana*,

368 U. S. 157, 176, Mr. Justice Douglas concurring. The case involves no genuine claim that Eckerd's right to "private" use of its property was interfered with by petitioners. To uphold petitioners' claims here affects only slightly the entire range of what are called private property rights. For if Eckerd's is disabled by the Fourteenth Amendment from enforcing by state action racial bias at its public lunch counter, homeowners are hardly disabled from enforcing their private rights even to implement racial prejudices. See Henkin, *supra* at pp. 498-500. There is a constitutional right of privacy protected by the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U. S. 643, 6 L. ed. 2d 1081, 1080, 1103, 1104; see also *Poe v. Ullman*, 367 U. S. 497, 6 L. ed. 2d 989, 1006, 1022-1026 (dissenting opinions). This Court has recognized the relationship between right of privacy and property interests. *Thornhill v. Alabama*, 310 U. S. 88, 105-106; *Breard v. Alexandria*, 341 U. S. 622, 626, 638, 644. Only a very absolutist view of the property right to determine who may come or stay on one's property on racial grounds would require that a unitary principle apply to the whole range of property uses, public connections, dedications, and privacy interests which may be at stake. Petitioners certainly do not contend that the principles urged to prevent the use of trespass laws to enforce racial discrimination in a restaurant operated for profit as a public business would prevent the state from enforcing a similar bias in a private home or office where the right of privacy has its greatest meaning and strength.¹ As Mr. Justice Holmes stated in *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355:

¹ The right of privacy cannot be destroyed by resort to the niceties of property law. *Chapman v. United States*, 365 U. S. 610, 617. "Rights of liberty and property, of privacy and voluntary association, must be balanced, in close cases, against the right not to have the state enforce discrimination . . ." Henkin, "Shelley v. Kraemer: Notes for a Revised Opinion," 110 U. of Penn. L. Rev. 473, 496, 490-505.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Where a right of private property is asserted by a proprietor so narrowly as to claim state intervention only in barring Negroes from a single portion of a public establishment, and that restricted assertion of right collides with the great immunities of the Fourteenth Amendment, petitioners respectfully submit that the property right is no right at all.

Moreover, the assertion of racial prejudice here is not "private" at all. The segregation here enforced is that demanded by custom of the City of Columbia. While "custom" is referred to in the *Civil Rights Cases* as one of the forms of state authority within the prohibitions of the Fourteenth Amendment, 109 U. S. 3, 17 (see also Mr. Justice Douglas concurring in *Garnier v. Louisiana*, 368 U. S. 157, 179, 181), Columbia's custom exists in a context of massive state support of racial segregation.²

² See S. C. A. & J. R. 1952 (47) 2223, A. & J. R. 1954 (48) 1695 repealing S. C. Const. Art. 11, §5 (1895) (which required legislature to maintain free public schools). S. C. Code §§21-761 to 779 (regular school attendance) repealed by A. & J. R. 1955 (49) 85; §21-2 (appropriations cut off to any school from which any pupil transferred because of court order; §21-230(7) (local trustees may or may not operate schools); §21-238 (1957 Supp.) (school officials may sell or lease school property whenever they deem it expedient); S. C. Code §40-452 (1952) (unlawful for cotton textile manufacturer to permit different races to work together in same room, use same exits, bathrooms, etc., \$100 penalty and/or imprisonment at hard labor up to 30 days; S. C. A. & J. R. 1956

Consequently, we have here state-nurtured and state-enforced racial segregation in a public institution concerning which no property right may be asserted in the face of the Fourteenth Amendment's prohibition of state enforced racial segregation. This state enforced segregation conflicts with Fourteenth Amendment principles which have been consistently asserted by this Court.

II.

The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States.

Petitioners were engaged in the exercise of free expression by means of nonverbal requests for nondiscriminatory food service which were implicit in their continued remaining in the food department when refused service. The fact that sit-in demonstrations are a form of protest and expression was observed in Mr. Justice Harlan's concurrence in *Garner v. Louisiana*, *supra*. Petitioners' expression (seeking service) was entirely appropriate to the time and place at which it occurred. Petitioners did not shout, obstruct the conduct of business, or engage in any expression which had that effect. There

No. 917 (closing park involved in desegregation suit); S. C. Code §§51-1, 2.1-2.4 (1957) (Supp.) (providing for separate State Parks); §51-181 (separate recreational facilities in cities with population in excess of 60,000); §5-19 (separate entrances at circus); S. C. Code Ann. Tit. 38, §§714-720 (1952) (segregation in travel facilities). On April 5, 1962, the City of Greenville, South Carolina arrested and charged a Negro with the crime of violating "Sec. 31.10. The Code of City of Greenville S. C. 1953. Be Unlawful for Colored person to occupy Residence in White Block" (arrest and trial warrant No. 179, *City v. Robinson*). Cf. *Buchanan v. Warley*, 245 U. S. 60.

were no speeches, picket signs, handbills or other forms of expression in the store which were possibly inappropriate to the time and place. Rather petitioners merely expressed themselves by offering to make purchases in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams v. United States*, 250 U. S. 616, 630, Holmes, J., dissenting), and was within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg v. California*, 283 U. S. 359 (display of red flag); *Thornhill v. Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 633-624 (flag salute); *N. A. A. C. P. v. Alabama*, 357 U. S. 449 (freedom of association).

Petitioners do not urge that there is a Fourteenth Amendment right to free expression on private property in all cases or circumstances without regard to the owner's privacy, and his use and arrangement of his property. This is obviously not the law. In *Breard v. Alexandria*, 341 U. S. 622 the Court balanced the "householder's desire for privacy and the publisher's right to solicit on a door-to-door basis. But cf. *Martin v. Struthers*, 319 U. S. 141 where different kinds of interests were involved with a corresponding difference in result.

The character of petitioners' right to free expression is not defined merely by reference to the fact that private property rights are involved. The nature of the property rights asserted and of the state's participation through its officers, its customs, and its creation of the property interest, have all been discussed above in connection with the state action issue as it related to racial discrimination. Similar considerations should aid in resolving the free expression question.

In *Garner v. Louisiana*, Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. It is submitted that even absent the owner's consent for petitioners to remain on the premises of this business establishment, a determination of their free expression rights requires consideration of the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action is supporting. *Marsh v. Alabama*, 326 U. S. 501.

In *Marsh, supra*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize for their faith, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill v. Alabama, supra*, involving picketing on company-owned property; see also *N. L. R. B. v. American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); and compare the cases mentioned above with *N. L. R. B. v. Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People v. Barisi*, 193 Misc. 934, 83 N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it." See also *Freeman v. Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland v. Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by this trespass prosecution, is support of the property owner's discrimination in conformity to the State's segregation custom and policy. This is all that the property owner has sought.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck v. United States*, 249 U. S. 47, 52. The only "substantive evil" sought to be prevented by this trespass prosecution is the elimination of racial discrimination and the stifling of protest against it; but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination.

The fact that the arrest and conviction were designed to short circuit a bona fide protest is strengthened by the necessity of the state court to make a strained and novel interpretation of the statute in order to bring petitioners' conduct within its ambit. Petitioners' conviction for trespass rests on an interpretation which flies in the face of the plain words of the statute, all prior applications, and ignores the most recent legislative amendment to said statute. The trespass statute prior to amendment read:

Every entry upon the lands of another after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon and shall publish once a week for four consecutive

weeks such notice in any newspaper circulating in the county in which such lands are situated, a proof of the posting and of publishing of such notice within twelve months prior to entry shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of hunting or fishing on such land. (Code of Laws, South Carolina, 1952.)

The amended statute under which petitioners' convictions were had added the language which is italicized:

Every entry upon the lands of another *where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another*

The Legislature obviously limited the statute to trespass on land primarily used for farm purposes. Petitioners have been able to find no cases under the instant criminal statute or its predecessors in which the trespass punished was not for entry on land (generally farm land) or some adjunctive land such as on the road.³ See *State v. Green*, 35 S. C. 266; *State v. Mays*, 24 S. C. 190; *State v. Tenney*, 58 S. C. 215; *State v. Hallback*, 40 S. C. 298; *State v. Gray*, 76 S. C. 83 (all cases of trespass on land or specifically farm land). The amendment was merely declaratory, making explicit on the face of the statute the prior applications. The action of the court below in extending the statute to business premises, is, therefore, completely novel and unsupported by prior cases or the recent amendment.

³ The only exceptions being sit-in convictions presently pending before this Court, *Columbia v. Barr et al.*, 123 S. E. 2d 521 (1961) (Petition for Certiorari No. 847 filed 30 U. S. L. Week 3324); *Charleston v. Mitchell, et al.*, 123 S. E. 2d 512 (1961) (Petition for Certiorari No. 846 filed 30 U. S. L. Week 3324), which were decided subsequent to the events which led to petitioners' arrest and conviction.

Further, the statute in terms prohibits only going on the land of another *after* being forbidden to do so. The Supreme Court of South Carolina has now construed the statute to prohibit also remaining on property when directed to leave the following lawful entry. In short, the statute is now applied as if "remain" were substituted for "enter." There is no history to support this second novel construction of the statute. No South Carolina case has ever adopted such a construction.* See Note 3, *supra* p. 20.

Subsequent to petitioners' conviction the legislature of the State of South Carolina enacted into law Section 16-388 a trespass statute making criminal failing and refusing "to leave immediately upon being ordered or requested to do so" the premises or place of business of another. See Petition for Writ of Certiorari in *Peterson, et al. v. City of Greenville*, No. 750 filed in this Court, 30 U. S. L. Week 3276.

There is no question but that petitioners and all Negroes were welcome in Eckerd's—apart from the restaurant (R. 29). The restaurant is an integral part of the store and can only be reached by "entry" into the store proper—to which petitioners were admittedly invited (R. 29). Absent the special expansive interpretation given Section 16-386 by the Supreme Court of South Carolina, the case would plainly fall within the principle of *Thompson v. City of Louisville*, 362 U.S. 199, and would be a denial of due

*As authority for this construction the South Carolina Courts cite *Shramek v. Walker*, 152 S. C. 88, 149 S. E. 331, which was a civil suit for trespass. But civil and criminal trespass have long been distinguished, the latter requiring, at common law, special circumstances such as breach of the peace. *Rex v. Storr*, 3 Burr. 1698. Cf. American Law Institute, Model Penal Code, Tentative Draft No. 2, §206.53, Comment.

process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners entered the premises "after notice . . . prohibiting such entry" and the conclusion that they did rests solely upon the special construction of the law.

Under familiar principles the construction given a state's statute by its highest court determines its meaning. Petitioners submit; however, that this statute has been judicially expanded to the extent that it does not give a fair and effective warning of the acts it now prohibits. Because of the expansive construction, the statute now reaches more than its words fairly and effectively define, and therefore, as applied it offends the principle that criminal laws must give fair and effective notice of the acts they prohibit.

The due process clause of the Fourteenth Amendment requires that criminal statutes be sufficiently explicit to inform those who are subject to them what conduct on their part will render them criminally liable. "All are entitled to be informed as to what the State commands or forbids", *Lanzetta v. New Jersey*, 306 U. S. 451, 453, and cases cited therein in note 2.

Construing and applying federal statutes this Court has long adhered to the principle expressed in *Pierce v. United States*, 314 U. S. 206, 311:

. . . judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. *Lanzetta v. New Jersey*, 306 U. S. 451, and cases cited.

In *Pierce, supra*, the Court held a statute forbidding false personation of an officer or employee of the United States inapplicable to one who had impersonated an officer of the

T. V. A. Similarly in *United States v. Cardiff*, 344 U. S. 174, this Court held too vague for judicial enforcement a criminal provision of the Federal Food, Drug, and Cosmetic Act which made criminal a refusal to permit entry of inspection of business premises "as authorized by" another provision which, in turn, authorized certain officers to enter and inspect "after first making request and obtaining permission of the owner." The Court said in *Cardiff*, at 344 U. S. 174, 176-177,

The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. *Herndon v. Lowry*, 301 U. S. 242.

The Court applied similar principles in *McBoyle v. United States*, 33 U. S. 25, 27; *United States v. Weitzel*, 246 U. S. 533, 543, and *United States v. Wälberger*, 18 U. S. (5 Wheat.) 76, 96. Through these cases run a uniform application of the rule expressed by Chief Justice Marshall:

It would be dangerous, indeed; to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated (*id.* 18 U. S. (5 Wheat.) at 96).

The cases discussed above involved federal statutes concerning which this Court applied a rule of construction

closely akin to the constitutionally required rule of fair and effective notice. This close relationship is indicated by the references to cases decided on constitutional grounds. The *Pierce* opinion cited for comparison *Lanzetta v. New Jersey*, *supra*, and "cases cited therein," while *Cardiff* mentions *United States v. L. Cohen Grocery Co.*, 255 U. S. 81 and *Herndon v. Lowry*, 301 U. S. 242.

On its face the South Carolina trespass statute warns against a single act, i.e., entry upon the land of another "after" notice prohibiting such. "After" connotes a sequence of events which by definition excludes going on or entering property "before" being forbidden. The sense of the statute in normal usage negates its applicability to petitioners' act of going on the premises with permission and later failing to leave when directed.

Petitioners do not contend for an unreasonable degree of specificity in legislative drafting. Some state trespass laws have recognized as distinct prohibited acts the act of going upon property after being forbidden and the act of remaining when directed to leave.⁵ South Carolina passed a statute punishing those who remain after being directed

⁵ See for example the following state statutes which do effectively differentiate between "entry" after being forbidden and "remaining" after being forbidden. The wordings of the statutes vary but all of them effectively distinguish the situation where a person has gone on property after being forbidden to do so, and the situation where a person is already on property and refuses to depart after being directed to do so, and provide separately for both situations: Code of Ala., Title 14, §426; Compiled Laws of Alaska Ann. 1958, Cum. Supp. Vol. III, §65-5-112; Arkansas Code, §71.1803; Gen. Stat. of Conn. (1958 Rev.), §53-103; D. C. Code §22-3102 (Supp. VII, 1956); Florida Code, §821.01; Rev. Code of Hawaii, §312-1; Illinois Code, §38-565; Indiana Code, §10-4506; Mass. Code Ann. C. 266, §120; Michigan Statutes Ann. 1954, Vol. 25, §28.820(1); Minnesota Statutes Ann. 1947, Vol. 40, §621.57; Mississippi Code, §2411; Nevada Code, §207.200; Ohio Code, §2969.21; Oregon Code, §164.460; Code of Virginia, 1960 Replacement Volume, §18.1-173; Wyoming Code, §6-226.

to leave two months after petitioners' conviction, Section 16-388, Code of Laws of South Carolina. See *supra*, p. 21. Converting, by judicial construction, the common English word "entry" into a word of art meaning "remain" or "trespass" has transformed the statute from one which fairly warns against one act into a law which fails to apprise those subject to it "in language that the common world will understand, of what the law intends to do if a certain line is passed" (*McBoyle v. United States*, 283 U. S. 27). Nor does common law usage of the word "entry" support the proposition that it is synonymous with "trespass" or "remaining." While "entry" in the sense of going on and taking possession of land is familiar (Ballentine, "Law Dictionary" (2d Ed. 1948), 436; "Black's Law Dictionary" (4th Ed. 1951), 625), its use to mean remaining on land and refusing to leave it when ordered off is novel.

Judicial construction often has cured criminal statutes of the vice of vagueness, but this has been construction which confines, not expands, statutory language. Compare *Chaplinsky v. New Hampshire*, 315 U. S. 568, with *Herndon v. Lowry, supra*.

At the time of their arrest, petitioners were engaged in the exercise of free expression by verbal and nonverbal requests for nondiscriminatory lunch counter service, implicit in their continued remaining at the lunch counter when refused service.

If in the circumstances of this case free speech is to be curtailed, the least one has a right to expect is reasonable notice in the statute under which convictions are obtained. *Winters v. New York*, 333 U. S. 507. To uphold petitioners' conviction by novel and enlarged construction of this statute is to violate the principle that when freedom of expression is involved conduct must be proscribed within a statute "narrowly drawn to define and punish specific

conduct as constituting a clear and present danger to a substantial interest of the State", *Cantwell v. Connecticut*, 310 U. S. 296, 307, 308; *Garner v. Louisiana*, 368 U. S. 157, 185 (Mr. Justice Harlan concurring). If the Supreme Court of South Carolina can affirm the convictions of these petitioners by such a construction it has exacted obedience to a rule or standard that is so ambiguous and fluid as to be no rule or standard at all. *Champlin Rev. Co. v. Corporation Com. of Oklahoma*, 286 U. S. 210. But when free expression is involved, the standard of precision is greater; the scope of construction must, consequently, be less. If this is the case when a State court limits a statute it must *a fortiori* be the case when a State court expands the meaning of the plain language of a statute. *Winters v. New York*, 333 U. S. 507, 512.

As construed and applied, the law in question no longer informs one what is forbidden in fair terms, and no longer warns against transgression. This failure offends the standard of fairness expressed by the rule against expansive construction of criminal laws which is embodied in the due process clause of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, for the foregoing reasons petitioners respectfully pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

JACK GREENBERG

CONSTANCE BAKER MOTLEY

JAMES M. NABRIT, III

MICHAEL MELTSNER

10 Columbus Circle

New York 19, New York

MATTHEW J. PERRY

LINCOLN C. JENKINS, JR.

1107½ Washington Street

Columbia, South Carolina

Attorneys for Petitioners